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In the Supreme Court
OF THE
United States

OCTOBER TERM 1973

No. 73-931

STATE OF CALIFORNIA, *Petitioner,*

vs.

ROBERT F. BROWN, et al., *Respondents.*

STATE OF CALIFORNIA, *Petitioner,*

vs.

ABBASS BOZORG, et al., *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The judgment petitioner seeks reviewed was entered by the California Supreme Court on June 19, 1973; it is reported as *In re Bozorg,* 9 Cal.3d 612, 108 Cal.Rptr. 359, 510 P.2d 1017.

JURISDICTION

Petitioner claims jurisdiction under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the trial jury was correctly instructed with respect to the scope of the First Amendment rights of speech and assembly accorded peaceful participants in a generally orderly demonstration in a public place.

2. Whether the infected judgment rule required reversal of respondent's convictions regardless of the validity of petitioner's contentions concerning the constitutional limitations upon "loud . . . noise".

3. Whether loud noise near a school can support conviction under a general breach of the peace statute which gives no warning that loud noise has different consequences in different places but purports to prohibit loud noise entirely.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions:

Amendment I provides in part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to assemble, and to petition the Government for a redress of grievances.

Amendment V provides in part:

> No person shall . . . be deprived of life, liberty or property, without due process of law; . . .

Amendment XIV, Section 1, provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citi-

zens of the United States: nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

Statutes:

California Penal Code § 407:

Whenever two or more persons assemble together to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly.

California Penal Code § 408:

Every person who participates in any rout or unlawful assembly is guilty of a misdemeanor.

California Penal Code § 415 provides in part:

Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person by loud or unusual noise, or by tumultuous or offensive conduct, . . . is guilty of a misdemeanor, and upon conviction by any Court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the County Jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the Court.

STATEMENT OF THE FACTS

While these respondents[1] will not burden the Court with a third description of the events of January 23,

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[1]These respondents are: Robert F. Brown, Sheila M. Brown, Terry B. Alt, Jean M. Cirimele, Martha J. McGee, Arnold Townsend, and Michael Bush. Respondents in *State of California v. Bozorg* have appeared by separate counsel and filed an Opposition.

1969, and the ensuing trials, it cannot escape comment that petitioner has presented a lavish description—admitted, in candor, to be the one most favorable to the prosecution (Petition, p. 5)—of the behavior of persons other than respondents both on this and on many other occasions. Pages 5 through 15 of the Petition describe almost entirely the behavior of others, or at best the behavior of "the demonstrators" or "the participants", as if a thousand people behaved exactly alike. This confusion of respondents with others, which petitioner either suffers or seeks to foster, reaches its most extreme and unsupportable form in the statement, made understandably without reference to the record, that "the evidence would also have supported conviction based upon conduct provoking violence or itself violent" (p. 21).

Although the California Supreme Court characterized the rally as "generally orderly" (Pet'n, App. A, p.ii), petitioner argues that the Court below did not "fully and fairly portray" the rally (p. 5), stooping to argue at one point (p. 11) that the rally was not "free from violence" because "[t]he demonstrators"—that monolithic myth—possessed but did not use "missiles capable of causing serious injury." That is not violence, and in any case has nothing to do with these respondents.

A more balanced and sober view of the "missiles" possessed by respondents (not others) appears in the opinion of the California Court (Pet'n, App. A, p. iv):

> One of the twelve petitioners had in his possession a large picket standard supported on a 2-by-4-inch stick; four had smaller picket standards in their possession; and one of these four also carried knitting needles with knitting attached; none of the others carried any objects which were confiscated.

That describes the *respondents*. Petitioner's desperate strategy is to argue that a 2-by-4 stick is too large for a picket sign (p. 11) and later to refer to such sticks as "clubs" (p. 16), although the only *respondent* with such a stick used it to support a sign, and although petitioner, after combing an eight-volume trial transcript in the *Brown* case alone, cannot find a single instance of the use of such a "club" as a club by anyone, respondent or not.

Petitioner's view of respondents' purpose is equally divorced from the actions of respondents themselves. Charging (p. 17) that "respondents and their associates"—the monolith again—"with intent to do so, disrupted many classes and final examinations. . . ." Petitioner juxtaposes the rally's slogan, "On Strike. Shut it down!" with the statement (p. 17) that "In size, dangerous implements and sheer noise level they had the means to do just as they threatened." Petitioner invites the conclusion that "On Strike. Shut it down!" meant not that some were urging others voluntarily to engage in a strike of school activities, *thereby* shutting it down, but that the monolithic "they" were prepared to chant, yell, and perhaps storm the buildings in order to shut the school by force of arms. That innuendo is nonsense, and in its

obviously painstaking review of the voluminous trial records petitioner can find or cite no support for it.

The California Supreme Court correctly and carefully focused (Pet'n, App. A, p. ii) on the purpose of *these* litigants:

> All petitioners [respondents here] were present at the rally for the purpose of hearing the speakers and demonstrating their support for the strike.

Petitioner can point to nothing which contradicts this description.

In short, these respondents attended a rally accurately described by the California Supreme Court as "generally orderly" in order to hear speakers and show their support for the strike. There is no evidence that these respondents intended or wanted anything else; petitioner's intimations to the contrary are utterly without foundation in the record.

REASONS FOR DENYING CERTIORARI AND SUMMARY OF ARGUMENT

Petitioner seeks to support respondents' convictions by reference to the behavior of others. Respondents' behavior cannot be constitutionally punished on this record.

Respondents' jury was erroneously invited by instructions to convict respondents whether or not they intended to communicate, under a general breach of the peace statute which makes no distinction between prohibited and permissible "loud . . . noise."

Respondents' convictions were overturned partly because they may have been based upon the "offensive conduct" portion of § 415, a theory not supported by the evidence. Since reversal on that ground is not challenged by petitioner, the infected judgment rule of *Street v. New York*, 394 U.S. 576 (1969), and related cases, supports reversal independent of the grounds attacked by petitioner.

Respondents could not constitutionally be convicted for disturbing a campus with classes in session under a general breach of the peace statute rather than a statute specifically tailored to the campus situation.

ARGUMENT

I.

THE JURY THAT CONVICTED THESE RESPONDENTS HEARD FATALLY DEFECTIVE INSTRUCTIONS

Petitioner concedes (pp. 19-20), as it must, that the instructions given to respondents' jury did not comply with *Cohen v. California*, 403 U.S. 15 (1971), or with *In re Bushman*, 1 Cal.3d 767 (1970). Petitioner argues that "equivalent, if not greater," protection was afforded (p. 20) by several other instructions, placing primary reliance on an instruction that:

> . . . pickets shouting in unison in a loud and boisterous manner disturbing the peace and quiet of the neighborhood and thereby interfering with a complainant's peaceful enjoyment of property is unlawful conduct.

The second "equivalent" instruction is said (p. 20) to be this:

> The offense known as breach of the peace embraces a large variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts likely to produce violence in others. When clear and present danger of immediate threat to public safety, peace or order appears, the power of the state to prevent or punish is obvious.

The first instruction has nothing to do with *Cohen* or *Bushman* and can hardly be called "equivalent" to those requirements. Moreover, it permits conviction for shouting which disturbs, requiring only that the shouting be intentional—an unconstitutional result (see *infra*, Section III). The Court below accurately characterized the instruction as permitting conviction (Pet'n, App. A, p. xii, n. 5):

> As long as there was shouting which disturbed others whether the shouting was for purposes of communication and regardless whether there was a clear and present danger of imminent violence.

The second equivalent instruction—a description of what the crime of breach of the peace "embraces" and "includes"—is not an "equivalent" instruction for the obvious reason that it only describes part of the reach of § 415 but none of its limits. Petitioner relies on it as if it said "includes and is limited to", but it does not. Once again, the instruction was properly characterized (Pet'n, App. A, p. viii) by the Court below:

> The reference to violence in the instructions was not by way of limitation but merely by way of illustration, pointing out that violence was included in conduct which might menace tranquility.

Thus no instructions "equivalent" to those required by *Cohen* and *Bushman* were given, and therefore the disposition of the matter by the Court below was correct.

II.

REVERSAL OF RESPONDENTS' CONVICTIONS WAS REQUIRED BY THE INFECTED JUDGMENT RULE EVEN IF PETITIONER'S CONSTITUTIONAL CONTENTION IS CORRECT.

Petitioner treats respondents' convictions under § 415 as if obtained only under the "loud . . . noise" portion of the statute.[2] This is incorrect; the Court below pointed out (Pet'n. App. A, pp. iv-vii) that the juries in both trials were instructed on the "offensive conduct" portion of the statute but that in neither trial was that phrase defined as required by *Cohen, supra.* The Court therefore premised its reversal in part upon the independently sufficient ground that the jury, which returned a general verdict, may have convicted respondents for "offensive conduct" without having been properly instructed upon the constitutionally permissible meaning of that phrase.

The California Supreme Court ended its analysis of the "offensive conduct" portion of the case (*id.* at vii) by ruling that the evidence did not warrant any instructions at all on the "offensive conduct" theory. Nowhere does petitioner challenge this ruling. Even if petitioner is right in the novel constitutional theory it urges, therefore, reversals were warranted

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[2]We do not understand petitioner to challenge the reversal of respondents' convictions for alleged violations of § 408.

because of improper instructions on the "offensive conduct" portion of § 415. This Court has consistently held that a general verdict will be reversed where the record fails to prove that the judgment is not founded upon a theory violative of the First Amendment. *Street v. New York*, 394 U.S. 576 (1969); *New York Times v. Sullivan*, 376 U.S. 254, 284 (1964); *Yates v. United States*, 354 U.S. 298, 311 (1957); *Terminiello v. Chicago*, 337 U.S. 1, 5-6 (1949); *Cramer v. United States*, 325 U.S. 1, 36, n. 45 (1945); *Williams v. North Carolina*, 317 U.S. 287 (1942); *Stromberg v. California*, 283 U.S. 359 (1931).

Any argument that either jury was properly instructed on the "offensive conduct" portion of § 415 is foreclosed by *Cohen v. California, supra*. Petitioner does not argue to the contrary. Therefore the Court need not reach petitioner's constitutional contention because improper instructions on the "offensive conduct" portion of the statute required reversal of the convictions whether petitioner's theory is right or wrong.

III.

LOUD SHOUTING AND CHEERING IS PROTECTED BY THE FIRST AMENDMENT WHEN IT IS INTENDED TO COMMUNICATE IDEAS UNLESS, AMONG OTHER THINGS, IT IS CAREFULLY PROSCRIBED IN CERTAIN PLACES BY A NARROWLY DRAWN STATUTE.

Petitioner characterizes (p. 24) the ruling of the California Supreme Court:

> . . . to afford First Amendment protection to noisy conduct whenever "communication" is in-

> tended even when the noise (1) disturbs the peace and (2) is intended to disturb the peace.

This is not at all what the Court held. The California Supreme Court simply held that loud noise intended to communicate could not be prohibited generally, as § 415 does, not that loud noise is protected "whenever" it is intended to communicate. The Court's holding is carefully qualified so that it does not reach loud speech intended to communicate but prohibited by a narrowly drawn restriction on noise near particular places (Pet'n, App. A, p. x), as well as being qualified by the necessity of a showing that the loud noise was intended to communicate, not to disrupt (*id*, at xi).

Part of petitioner's error stems from its continual attempt to characterize the noise made by the demonstrators as "conduct" rather than speech. See Pet'n, pp. 25-26. But the behavior at issue here is indistinguishable from the singing, stamping, and clapping called the exercise of First Amendment rights "in their most pristine and classic form" in *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963), and from the cheering, clapping, and singing in *Cox v. Louisiana*, 379 U.S. 536 (1965), which the Court found "strikingly similar", *id.* at 544, to the conduct at issue in *Edwards*. Petitioner's description of this as "conduct" subject to different rules has no support.

But most of petitioner's error stems from a failure to recognize the difference between the power of the state to punish loud noise near a school under a narrowly drawn statute affecting schools as opposed to punishing that conduct under a general breach of the

peace statute. This failure is apparent from petitioner's continued reliance upon *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

In *Grayned* the Court sustained a conviction under a statute which was narrowly drawn to regulate noise around classes in session, saying that "[a]lthough the question is close", *id.* at 109, the statute was not overly vague. The Court carefully distinguished the *Grayned* situation from conviction under a general breach of the peace statute:

> We do not have here a vague, general "breach of the peace" ordinance, but a statute written specifically for the school context, where the prohibited disturbances are easily measured by their impact on the normal activities of the school.
>
> *Id.* at 112.

The Court then distinguished *Cox, supra*, on the ground that it involved a general breach of the peace statute, and noted, *id.* at 113, that "Rockford does not claim the broad power to punish all 'noises' and 'diversions.'" Section 415 claims the broad power to punish all "loud . . . noise".

The California Supreme Court correctly perceived the essential difference between *Grayned*, on the one hand, and this case, *Cox*, and *Edwards* on the other:

> Precisely worded statutes establishing reasonable regulations based on the time, place or manner of the exercise of the right of speech will be upheld . . . . Although the Legislature by carefully drafted statutes could properly establish substantial limitations on noise in particular places such

> as areas near hospitals and campuses [citing, *inter alia*, *Grayned*], section 415 contains no such limitation but applies to all neighborhoods and in addition, to all persons who are disturbed.
>
> Pet'n, App. A, p. x.

Thus petitioner's claim that noise intended to disturb is always punishable no matter what other intent is present should await adjudication until presented in the context of a narrowly drawn statute such as in *Grayned*. It should also await an appropriate factual situation: the California Supreme Court has described the purpose of these respondents as being merely to hear speakers and demonstrate support for the strike (Pet'n, App. A, p. ii), not to communicate and to disturb as well. Petitioner is reduced to arguing its point (Pet'n, pp. 27-28) in the context of a hypothetical minority hospital employee because the facts of this case do not lend themselves to the argument.

Finally, petitioner concedes (p. 30) that § 415 can constitutionally reach loud noise in some situations but not others. The California Supreme Court rightly held that a conviction under §415's general prohibition of "loud . . . noise" suffers the same flaw found by this Court in *Cohen*, *supra*, in a conviction under § 415's general prohibition of "offensive conduct"—that it gave no warning of distinctions between localities and situations. Pet'n, App. A, p. x. Petitioner makes the same argument here that was rejected in *Cohen*, *supra*—that the "ordinary person" (p. 29) ought to know those distinctions without being told in a statute. The argument deserves summary rejec-

tion for the same reasons that the same argument was rejected in *Cohen, supra*, 403 U.S. at 19:

> No fair reading of the phrase "offensive conduct" can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.
>
> (Footnote omitted.)

No more warning is given by the phrase "loud . . . noise".

CONCLUSION

For all of the aforementioned reasons, certiorari should be denied.

Dated, April 4, 1974.

Respectfully submitted,

CHARLES C. MARSON,
JOSEPH REMCHO,
PETER E. SHEEHAN,
DEBORAH HINKEL,
TOBY SHERWOOD,
American Civil Liberties Union Foundation
of Northern California, Inc.,
Attorneys for Respondents
Brown, et al.